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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1620

EARL EILERS, ET AL,

Petitioners,

v.

HERCULES, INC., ET AL,

Respondents.

ON PETITION FOR CERTIORARI

BRIEF OF RESPONDENT THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A Respondent, Santa Fe, respectfully submits that for the reasons herein set forth, the Petition for Certiorari should be denied.

QUESTION FOR REVIEW

Whether a railway tank car dome cover is a required Federal safety appliance under the Federal Safety Appliance Acts (quoted Appendix A pps. A1-8, Petition for Certiorari).

Petitioners contend it was.

The Texas Appellate Courts decided it was not.

1.

There is no conflict with applicable decisions of this Court. In the main, Petitioners contend that the Appellate Courts of Texas are in conflict with the Shields case by this Court.

In *Shields v. Atlantic Coast Line R. Co.*, 380 U.S. 318 (1956), this Court held that a dome platform came within the meaning of the term "running boards" as used in the Safety Appliance Acts and was required to be "secure" because the dome platform served the same purpose and was used in the same manner as a "running board" and was frequently referred to by experienced railroad men as a "running board."

This Court imposed liability because the dome platform did not meet the standard prescribed by the Safety Appliance Acts §2, requiring all cars to be equipped with "secure running boards." The carrier was held guilty of negligence as a matter of law. The contractor of the consignee engaged in unloading the tank car, injured when the dome platform collapsed, was held to be within the class of persons afforded protection by the Acts as the obvious purpose of the dome running board was to provide a secure flooring for those engaged in operations in connection with the loading and unloading of the tank car.

The determination made in Shields case was that the dome running board or platform was a safety appliance as a matter of law.

The Texas Supreme Court refused writ of error to review the Court of Civil Appeals' holding in this case

that as a matter of law the dome lid cover on a tank car was not a safety appliance within the meaning of the Acts because it was not mentioned in the Acts and no standard was prescribed in the Acts to be met by a dome cover. The Court of Civil Appeals in its opinion clearly and correctly distinguishes between the Shields case and this cause.

The basic determination upon which all courts involved in the problem have agreed, is that the question of whether a particular item is a safety appliance under the Federal Acts is one of law for determination by the court as opposed to fact.

On this score the judgment and decision of the Texas Court of Civil Appeals and the Supreme Court of Texas are strictly in accord with the applicable decisions of this Court.

2.

The decision of the Texas Court of Civil Appeals and the Texas Supreme Court are correct.

The trial court jury did not find any act or omission by Respondent Santa Fe to be negligent (Tr., Vol. III, pps. 552-592).

The only possible basis for imposition of liability on Santa Fe was the asserted violation of the Federal Safety Appliance Acts. On close inspection the jury verdict does not support this basis. The trial jury did not find a violation of the Federal Safety Appliance Acts. The answers of the jury to the questions put to them failed to connect the "safety appliance" which they found in the dome lid cover to the Federal Acts in any way. The jury did not

find the dome lid cover of the tank car to be a safety appliance under the Federal Acts, but found only that it was a "safety appliance" as defined in the accompanying instructions. This instruction did not mention or refer in any manner to the Federal Safety Appliance Acts. In *Shields* the Court placed emphasis on the obvious purpose of a dome running board to provide a secure flooring for those who must perform operations in connection with the tank car. By contrast, the obvious purpose of the dome lid is to contain the contents while in transit and give access to the interior of the car at destination. It does not serve a purpose similar to that of any of the items of equipment designated in the Safety Appliance Acts. It was not designed or intended to act as a safety valve. The car involved here was equipped with safety valves and the trial court jury refused to find that they were deficient in any of the several ways suggested in the issues put to them (Tr. Vol. III, pps. 560-62).

Dome lid covers for tank cars are not mentioned in the Safety Appliance Acts. Neither the Acts nor the regulations under them set forth any standards that are to be met by dome covers.

The dome covers are not similar to or within the general category of any of the equipment designated in the Acts; it is not used and is not capable of serving as a substitute for any such equipment; it has no function in respect of train or car movement.

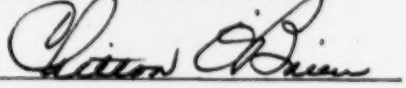
Here as in case of *Mazzucola v. Pennsylvania Ry. Co.*, 281 F.2d 267 (Third Cir. 1960), "Plaintiff's claim for protection under the Federal Safety Appliance Acts is as ingenious as it is unsound."

CONCLUSION

It is respectfully submitted that no sound reason exists for grant of certiorari in this case, and that the Petition should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I am a member of the United States Supreme Court bar and one of the counsel of record for the Respondent, The Atchison, Topeka and Santa Fe Railway Company herein and that on the 19th day of May, 1971, three (3) copies of the above and foregoing Brief of Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition to Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rule 33, Paragraph 1, by depositing same in the United States post office, Beaumont, Texas, with first class postage prepaid, and properly addressed to their respective counsel of record at the post office address of each, to wit:

Petitioners, Earl Eilers & Peggy Patrick, et al, to their counsel of record:
Gilbert I. Low, Beaumont Savings Building, Beaumont, Texas, 77701; Joe H. Tonahill, March H. Coffield, Tonahill Building, Jasper, Texas, 75951.

Respondent, Hercules, Inc., to its counsel of record: Mr. Richard B. Miller, Baker, Botts, Shepherd & Coates, 1 Shell Plaza, Houston, Texas, 77001.

Respondent, Union Tank Car Company, to its counsel of record: Mr. George A. Weller, Weller, Wheelus, Green & Brocato, Beaumont Savings Building, Beaumont, Texas, 77701.

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